



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Randy Date  
**Respondent:** Ministry of Defence  
**Heard at:** East London Employment Tribunal  
**On:** 6, 7, 8, 12 November 2019  
**Before:** Employment Judge Burgher  
**Members:** Ms L Conwell–Tillotson  
Ms J Owen

## Representation

**For the Claimant:** Mr R Powell (Counsel)  
**For the Respondent:** Mr C Milsom (Counsel)

# JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1. The Claimant's claim for race discrimination against the Respondent in relating to a formal appraisal wrongly stating that he undertook the Right Turn course is well-founded.
2. The Claimant's other claims for race discrimination fail and are dismissed.

# REASONS

## Introduction

1. This is a race discrimination claim brought by the Claimant, a black Afro-Caribbean infantry soldier, against the Ministry of Defence concerning his short

period of posting in the Training Wing of the Military Correction Training Centre (MCTC) in Colchester.

### **Issues**

2. At the outset of the hearing the issues were clarified as the following:
  - 2.1 Sergeant Birch and Mr Elliott made insulting comments about the Claimant in a WhatsApp group chat which the Claimant discovered on 29 November 2017.
  - 2.2 Flight Lt Taylor and/or Mr Steve Elliott criticised the Claimant's performance on a course that he did not carry out but which was carried out by the only other black Senior Non Commissioned Officer (SNCO) on the Training Wing.
  - 2.3 Flight Lt Taylor and/or Mr Steve Elliott included critical comments in the Claimant's Soldiers Joint Appraisal Report (SJAR).
3. The Claimant had previously sought to advance a fourth allegation, that Flight Lt Taylor and/or Mr Steve Elliott failed to prepare his Mid Period Appraisal Report (MPAR). This allegation was subject to a deposit order and was subsequently dismissed following withdrawal by the Claimant. Nevertheless the Claimant's counsel, Mr Powell, sought to refer to this allegation as background information with a view to supporting the existing claims.

### **Evidence**

4. The Claimant gave evidence on his own behalf and called Sgt Masoud Rashid to give evidence in support.
5. The Respondent called Flight Lieutenant Taylor, Sgt Stephen Birch and Lieutenant Colonel Nowell to give evidence on its behalf.
6. All witnesses gave evidence by way of sworn witness statements and were subject to cross-examination and question by the Tribunal.
7. The Respondent also intended to call Mr Stephen Elliott, previously a Sergeant Major in the MCTC Training Wing. Mr Elliott had provided a witness statement which was unsigned prior to the hearing. The Tribunal was informed that Mr Elliott had indicated his reluctance to attend the hearing due to resistance from his current employer and the Respondent applied for a witness order, which was granted. Mr Elliott did not attend Tribunal pursuant to the witness order but had spoken to the Respondent's counsel and informed him about the poor health of a close family member which prevented his attendance. The Respondent did not maintain its request for Mr Elliott to give evidence and asked for the witness order to be revoked. This was done. The Respondent stated that it was prepared to continue with the hearing in the absence of Mr Elliott notwithstanding the limited weight that could be given to his unsigned statement.

8. The Tribunal was also referred to relevant pages in an agreed hearing bundle consisting of over 435 pages and permitted a number of miscellaneous documents to be added for consideration.

### **Overview and assessment of witnesses**

9. The Tribunal found the Claimant to be a credible witness and his evidence reflected his honest and reasonable response to the concerns he expressed whilst deployed on the Training Wing.

10. The Tribunal found Sgt Masoud to be a sincere but unreliable witness whose evidence was tarnished by his own unresolved personal grievances that he has with the Respondent.

11. The Tribunal was unimpressed with the evidence of Flight Lt Taylor. His evidence relating to the Claimant's performance appraisal was vague and unsupported by any contemporaneous records to substantiate his findings on his purported classroom appraisal of the Claimant. He was unable to specify the date of any such classroom assessment or the content of it. It is evident that he wrongly initially stated that the Claimant had undertaken the Right Turn course.

12. The Tribunal found the evidence of Sgt Birch to be unremarkable. He narrated his involvement of the WhatsApp messages allegation and the meaning of certain terms.

13. As far as Lt Col Nowell is concerned, the Tribunal found his evidence demonstrated impartiality and reliance on reporting processes which, perhaps unsurprisingly given his seniority, allowed for a level of disconnection with the daily operations in the lower ranks.

### **Facts**

14. The Tribunal has found the following facts from the evidence.

15. The Claimant is black and was born in Grenada. He joined the British Army in September 2003 as a rifleman and subsequently carried out several tours including in Kosovo, Northern Ireland, Iraq and Afghanistan.

16. On 1 October 2014 the Claimant was successful in achieving promotion to Sergeant and was responsible for disciplinary and security within his unit. Due to health problems the Claimant applied for and was subsequently assigned to the Military Povost Staff (MPS). This transfer took place on 13 February 2015.

17. In MPS the Claimant was initially employed as a military custodian at MCTC in the D Wing. The Claimant received a formal diagnosis of post-traumatic stress disorder on 18 February 2016 by an army doctor and he was placed on sickness absence between 18 February 2016 and 13 February 2017. However, from 7 November 2016 to 13 February 2017 the Claimant was placed on gradual return to work (GRoW) programme.

18. The Claimant received an SJAR on 21 January 2017 completed by Captain Wharton commenting on the Claimant's performance as a custodian. It stated, amongst other things, that the Claimant "*displayed a relaxed style whilst still being able to encourage the detainees to meet good standards. He uses his relaxed approach to his advantage when dealing with vulnerable detainees enabling him to build a good rapport with them and gain information from the individual...*". The claimant had no concerns with this SJAR and accepted in evidence that he is a relaxed person.

19. The Claimant was transferred to the Training Wing with effect from April 2017 and was employed under an "Appendix 9 form" which outlines medical and/or functional restrictions to the unit.

20. The Claimant did not receive an MPAR in June 2017 due to his long period of absence from November 2016 to February 2017 and his subsequent transfer from D Wing to the Training Wing. Whilst Flight Lt Taylor could have undertaken an MPAR he did not do so as he had only been appointed to the Training Wing in June 2017 and he would have had to rely on the generally negative comments about the Claimant being conveyed to him by Flt Lt Wood (Training Wing officer prior to him), Mr Elliott (Sgt Major at the time), and from other sergeants including Sgt Birch.

21. The Claimant did not believe that his Training Wing colleagues adopted a sensitive attitude to his sickness absence. He also maintained that because he is black and from a Caribbean Island that '*they*' believed he was lazy and uncooperative for reasons not linked to his health. He believed that '*they*' were suspicious of him due to the fact that he is black and from a Caribbean island. *They*, in the context of this case, has been assessed as his colleagues, in particular Flight Lt Taylor, Sgt Birch and Mr Elliot.

22. Flight Lt Taylor joined the Training Wing in June 2017 and from the period 26 June 2017 to 3 October 2017 the Claimant was absent from work for at least 36 days. Flight Lt Taylor was aware that the Claimant was absent from the D Wing for 323 days the previous year including the Claimant's time on GRow. Flight Lt Taylor concluded that the Claimant's absences meant that the Claimant could not be relied on for timetabling classes. Consequently, the Claimant was generally not placed on the rota and was given work in the office to support other officers in lesson preparation and administrative tasks. Flight Lt Taylor jumped to the conclusion that the Claimant was seeking to be discharged from the Army and was biding his time until this took place.

23. Sgt Rashid gave evidence that following the Claimant lodging a service complaint in February 2018 Sgt Birch, Mr Elliott and Flight Lt Taylor were overheard speaking negatively of the Claimant. Sgt Rashid stated that he had heard Mr Elliott saying that the Claimant was a typical Afro-Caribbean and that he was lazy and that Sgt Birch would say similar things. Sgt Rashid also alleged that he overheard Flight Lt Taylor say that the Claimant was "*fucking useless*". Flight Lt Taylor and Sgt Birch denied these allegations.

24. Sgt Rashid stated that there was a very toxic and hostile environment in the Training Wing for those of an ethnic minority status and he believed that there was

less favourable treatment for those with his and the Claimant's ethnicity or colour of skin. He continued to state that it was 'very clever' in the way they treated them and he struggled to find evidence in order to make a valuable complaint. We find that if Sgt Rashid had witnesses or heard something as clearly discriminatory as he alleged he would have at least referred that to the Claimant, notwithstanding his reservations about not wishing to get involved.

25. When questioned on this Sgt Rashid stated that he did in fact relay what he had allegedly heard to the Claimant, which would have been the natural thing to do. However, the Claimant flatly denied that Sgt Rashid had informed him about this. It is obvious that had Sgt Rashid done so this would have formed part of the Claimant's internal service complaint and claim to the Tribunal.

26. The Tribunal also had regard to the derogatory term used for women demonstrated in the WhatsApp conversation (set out below) we find that it is unlikely that the formal term 'Afro Caribbean' would have been used by soldiers speaking negatively about the Claimant's ethnicity. We find that it is more likely that slanging reference to colour would have occurred if it was being discussed. We therefore do not accept Sgt Rashid's evidence relating to allegedly witnessing comments referencing Afro Caribbean. We are however, prepared to accept his evidence regarding witnessing comments about the Claimant being lazy and useless given the evidence of Flight Lt Taylor and Sgt Birch concerning their opinion of the Claimant's performance.

27. On 1 October 2017, the Claimant commenced a period of long term sick leave and did not return to work. The Claimant's absence affected the workload of his fellow sergeants on the Training Wing. We find that informal discussions and comments about the Claimant's absence and usefulness were being shared between the sergeants during this time.

28. The Training Wing had nine SNCO Sergeants including the Claimant. They were all members of the Training Wing WhatsApp group. Flight Lt Taylor was also a member of the group. The idea of the WhatsApp group was to share information relating to work and ensure that open communications could take place in a less formal format. Sergeant Kelly was the administrator of the WhatsApp group and added the relevant personnel when required.

#### WhatsApp

29. On 27 November 2017 there was a WhatsApp group conversation that read as follows:

**James Lane 18:04**

*"So....No big Phil tonight in the Albert Hall.... Some fucking squeezer of a split arse has monumentally fucked up with our tickets and sold em twice."*

*"Mega happy"*

**Stephen Birch 18.11**

*"Unreal I think it was Randy Day, as he asked some time off as well, bad times all that expense sorry to hear that."*

**James Lane 18.12**

*"Threaders mate"*

**Slashpants43 18.14**

*There is always YouTube popcorn and beer from the sofa sorry mate*

**Steve Elliot 18.17**

*Randy Date. He gets fecking everywhere 🤔🤔🤔  
Except work!!!"*

30. On the evidence before us the term "split arse" is a wholly unacceptable and derogatory term used by service personnel to exclusively refer to women. We accept that Sgt Lane's derogatory comment in this regard was directed to the call handler of the ticket company who he thought had sold his ticket to someone else by mistake. We also accept that this term did not have any racial connotations.

31. Following consideration of the evidence we accept that reference to the Claimant by Sgt Birch was seeking to be witty in referring to the Claimant as the person who bought the ticket and thereby would be attending the Phil Collins (big Phil) concert rather than Mr Lane.

32. The Tribunal did not hear from Mr Elliott in relation to part of this WhatsApp conversation. However, by the time of the WhatsApp conversation the Claimant had been absent on long-term sickness since 3 October 2017. The Claimant's colleagues were not informed as to the precise reasons for the Claimant's sickness absence. We find that the Claimant's colleagues were discussing the frustrating effect of the Claimant's absence on their day-to-day management of work and the WhatsApp sent by Mr Elliott reflected that frustration in supposedly sarcastic terms. We find that it is likely that such comments were being discussed prior to this WhatsApp conversation and in sending the message Mr Elliott had obviously overlooked the fact that the Claimant was party to the WhatsApp conversation and could read what was being said.

SJAR

33. The Respondent has a Soldiers Joint Appraisal Report process (SJAR). Before a SJAR is completed the Respondent convenes a Sergeant Grading Board where all sergeants are graded in an Order of Merit. There were about 70 Serjeants in MPS. There were 9 Serjeants employed in the Training Wing including the Claimant. The Claimant and Sgt Rashid were the only black, or ethnic minority sergeants out of the 9 in the Training Wing.

34. The officers reported to the grading board, led by Lt Col Nowell where each sergeant is discussed, for approximately 5 minutes, in respect of evidence for overall performance in order to agree the order of merit. All officers are able to provide input. During this process the Claimant and Sgt Rashid were placed in the bottom third of the order of merit.

35. Three separate officers who had held a command over the Claimant during the reporting period, namely Flight Lt Wood, Flight Lt Taylor and Major John Wharton were able to consider the Claimant's grading. In addition, Lt Col Nowell also had a process that allowed him to get informal anonymous feedback about the Claimant (and other sergeants) from the detainees under sentence (DNUS) at the end of their sentence, some of whom were instructors themselves, about the Claimant's teaching ability. This was generally negative.

36. After the grading board all the first reporting officers were directed to draft their reports and submit them to Lt Col Nowell for agreement to cross check against the board results prior to them being served on their subjects. Flight Lt Taylor was the Claimant's first reporting officer and drafted the original SJAR. Lt Col Nowell agreed the Claimant's SJAR after proofreading and cross-checking across the grading board's order of merit. The SJAR report was then served on the Claimant in early January 2018.

37. The Claimant was upset with the initial SJAR report which graded him at overall C and took issue with the following aspects.

*"Date's performance this reporting period has been significantly below par and he has struggled to find his role within MPS. Date is a quiet SNCO who exudes an indifferent attitude to his work...."*

*His time within the company MCTC in the first half of the year proved to be a difficult period for Sgt Date who functioned within the companies with a degree of tolerance due to him spending a considerable amount of time away from the role. Date simply did what was asked of him and was happy to do the minimum expected of him.*

*His time within [Training Wing] has been short through no fault of his own he has been largely absent from the majority of the reporting period. Date has been utilised as an instructor of the Right Turn course which aims to promote self-belief and enthusiasm is within DNUS. His instruction, which I have observed, has been adequate but at times seems badly prepared, seemingly heavily reliant on course notes to deliver lessons. This was confirmed by both the DNUS and fellow instructors.*

*.... Date has fallen behind his peer group in terms of performance and continues to find his place as an SNCO.*

*I am unsure as to what area within the MPS he would be most suited as he struggled with both training and custodial roles.*

*Wherever he finds himself he must show enthusiasm for the role he fulfils and proved to the unit that he can add value to reach its full potential.”*

38. The Claimant strongly disputes that there was any evidential basis for the assessment of his performance. He rightly asserts that at no stage had he been informed of any shortcomings of his performance and he disputes that there was any assessment undertaken of him. The Claimant states that the grading for simply turning up would be a grade B yet he was given a poor overall grade C.

39. The Claimant objected to the reference made in the appraisal about him being an instructor on the Right Turn course. The Claimant stated that he undertook training for artillery and field craft but had never undertaken the Right Turn course training and that it was Sgt Rashid, the only other black sergeant in the Training Wing, who undertook the Right Turn course training.

40. Flight Lt Taylor accepted that he had made a mistake in referring to the Claimant as being an instructor on the Right Turn course on the appraisal. He stated, in oral evidence, that he made this mistake as a result of where the class had been actually undertaken, namely the left hand class room. This explanation was not part of his initial written witness statement or any evidence given by him in the internal service complaint raised by the Claimant. The Tribunal also considered the unsigned statement of Mr Elliott where it is stated at paragraph 17 that Mr Elliott had reviewed the Claimant's instructing abilities and he also wrongly concluded that the Claimant had undertaken the Right Turn course.

41. On the evidence we are unable to conclude that Flight Lt Taylor made any observations of the Claimant's teaching at all. He was unable to specify when the teaching assessment took place, whether the Claimant was aware the teaching observation had been undertaken or what the topic of the training was said to be. There were no notes or documentation to demonstrate that there was any such assessment of the Claimant by him. We find it is more likely that Flight Lt Taylor simply relied on what Mr Elliott had relayed to him about the Claimant's instructing abilities. Mr Elliot was the Claimant's team leader and would have had direct opportunity to assess and review the Claimant. We find that Flight Lt Taylor was incorrect in asserting that Mr Elliott attended the sergeants grading board to provide feedback there. Lt Col Nowell denied this. However, we find that Flight Lt Taylor's evidence in this regard indicates his reliance on Mr Elliott when he formed his opinion of the Claimant. Further, Flight Lt Taylor was not an instructor himself and following his appointment to the Training Wing he stated he had assigned the Claimant to office and administrative duties. The Claimant was then frequently absent and commenced a period of sickness absence for which he did not return from the beginning of October 2017.

42. Whilst we find that Flight Lt Taylor did not actually observe the Claimant as stated in the SJAR we do not conclude that the appraisal itself was altogether erroneous. We find that it was based on actual, if subjective, feedback given to Flight Lt Taylor and Lt Col Nowell by former officers and colleagues who had encountered and assessed the Claimant, including Mr Elliott, and instructors and detainees under sentence who left anonymous feedback at the end of their sentences.



43. Consequently, we find that there was a demonstrable belief held by others that the Claimant was not enthusiastic in his performance. This may have been due to his continued and intermittent absence which was frustrating at operational levels and there was a lack of engagement or understanding by the serjeants he worked with as to the reasons why he was off absent from work.

44. The Claimant objected to the SJAR wording and alleged that Flight Lt Taylor was racist in completing it.

45. On 16 January 2018 Flight Lt Taylor reported to Captain Green an email in the following terms:

*“For your awareness, Sgt Date has finally managed to read his SJAR (attached) via email as he has not responded to phone calls or texts for myself until now. He has said he was unable to login to DII as he does not have DII access near his home location.*

*I spoke with Sgt Date at 1450 today to discuss his SJAR and gain his permission to forward it on via proxy. Sgt Date was both rude and obnoxious towards myself and hung up on me, I then had to ring him back in order that I could get permission to forward his SJAR on. Sgt Date declared to me that he believed both myself and this Unit was racist and that he had been treated unfairly. He said that I do not have his permission to move on the SJAR and the next time we would hear from him would be by his Lawyer. I explained that I was unsure as to how he could find the SJAR racist and that it would need to be moved on anyway. Sgt Date was extremely angry and I felt it best that we end the phone call quickly.”*

46. This was relayed to Lt Col Nowell on 16 January 2018. Lt Col Nowell responded by email of the same date stating:

*“... I’m not been held to ransom by Sgt Date holding up the racist card. It’s utter rubbish and the sole defence of an otherwise underperforming SNCO*

*Give him the option to re-engage if he fails to do so (appropriately and without any hint of insubordination) then move his report on and I will note his deliberate lack of interaction in the two reporting officer notes*

*He may have issues but I need to take a strong but defensible line with people like him to drive up the standard of our staff.”*

#### Service complaint

47. The Claimant presented a service complaint on 1 February 2018 and alleged three areas of complaint, namely unfair and discriminatory debrief which related to a Regimental Sergeant Major whilst he was at D wing, the content of the WhatsApp group conversation on 29 November 2017, and the contents of his SJAR, including the failure to provide him with an MPAR. The Service complaint stated the following:

“16 I believe I have been subject to adverse criticism due to my status as a soldier currently on sick leave suffering from PTSD.

17 My performance has been criticised for being “significantly below par” the criticism has been made by both “DNUS and fellow instructors during feedback”. The fellow instructors were Sgt Birch and Sergeant Major Elliott who made or were party to the criticism of me within the WhatsApp group and I believe there may be racial motives/stereotypes behind their attitude to me and their arbitrary criticism of me.

18 Further the SJAR makes reference to: “Date has been utilised as an instructor from the Right Turn course” whereas Sgt Rashid was the Right Turn instructor. Sgt Rashid is the only other black and SNCO in the Training Unit and I believe I have been confused with him due to my colour.

19 I believe I have suffered adverse treatment due to being a soldier suffering from PTSD and unfair and arbitrary criticism has been made of my performance for reasons which have been beyond my control as a Sgt and my professional reputation has been adversely affected.

20 I also believe the aforementioned conduct towards me has been influenced by my race/colour and the behaviour towards me has been a continuous course of conduct.”

48. Following the Claimant’s service complaint, the SJAR wording was significantly softened. Flight Lt Taylor held a meeting with the Claimant on 15 February 2019 correcting the mistake relating to the Right Turn course taught and he removed references to the Claimant’s “indifferent attitude” and “being happy to do the minimum expected of him”. The Claimant’s grading was revised from an overall grade of C to B-.

49. Separate to the service complaint Lt Col Nowell conducted an immediate internal equality and diversity harassment investigation relating to the WhatsApp group conversation. Major Jason Hutchinson was asked to investigate the complaint. A report was completed on 5 March 2018 and did not identify any evidence of bullying harassment or racial discrimination in the context of the WhatsApp conversation. Lt Col Nowell determined that although the report observed that some of the language used in the conversation were inappropriate as Mr Elliott had admitted the comments were inappropriate and was apologetic if it caused any offence no formal administrative action would be taken against him as it coincided with the retirement date after 24 years of exemplary service. Lt Col Nowell informed Mr Elliott that he had sailed dangerously close to the threshold of the Respondent’s values and standards breach but that it was not in the service interests to pursue any formal administrative or disciplinary action during his final days of service.

50. During the investigation of the service complaint Flight Lt Taylor commented that the Claimant was one of the worst soldiers he had ever worked with. The Claimant was apparently insubordinate to Flight Lt Taylor regarding the SJAR but in relation to performance Flight Lt Taylor had to little personal basis for this statement. Leaving aside the feedback from Mr Elliot and others Flight Lt Taylor had at most

three months undocumented observation for which the Claimant was absent for a significant period. We therefore find that by the time Flight Lt Taylor had made these remarks he was upset by the insubordination that the Claimant had shown towards him and the allegations that the Claimant had made against him.

51. The Claimant formally pursued his service complaint under section 340A of the Armed Forces Act 2006 on 27 February 2018. This was determined on 5 December 2018, concluding that there was no racial bias or prejudice. The Claimant was offered an apology in respect of the WhatsApp comments. The Claimant appealed against this decision on 20 December 2018. His Board Appeal Body determination was issued on 12 July 2019 dismissing his complaints of race discrimination.

### Law and submissions

52. The Tribunal applied the following statutory provisions, appellate court authority and guidance when considering the issues of the case.

53. Section 13 Equality Act 2010 (EqA) defines direct discrimination.

*'13(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

*(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*

*(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*

*(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.*

*(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.*

*(6) If the protected characteristic is sex –*

*(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;*

*(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.*

*(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).'*

54. Section 9 EqA defines race as a protected characteristic. The Claimant asserts that he is treated less favourably because he is black Caribbean.

55. Section 136 EqA sets out the burden of proof provisions.

*“(1) This section applies to any proceedings relating to a contravention of this Act.*

*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

*(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

*(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*

*(5) This section does not apply to proceedings for an offence under this Act.*

*(6) A reference to the court includes a reference to –  
(a) an employment tribunal;”*

56. The Court of Appeal, in Madarassy v Nomura International Plc [2007] EWCA Civ. 33, stated at paragraph 56.

*“The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent ‘could have’ committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination). It was confirmed that a Claimant must establish more than a difference in status (e.g. race) and a difference in treatment before a tribunal will be in a position where it ‘could conclude’ that an act of discrimination had been committed.”*

57. The burden is therefore on the Claimant to prove, on the balance of probabilities, a prima facie case of discrimination.

58. Mr Milsom, counsel for the Respondent, referred the Tribunal to the cases of Tirkey v Chanhok [2015] ICR 527 and Hak v St Christopher’s Fellowship [2016] ICR 48 referring to the basis from which inferences of discrimination can be drawn.

59. He also referred the Tribunal to the cases of Stockton on Tee Borough Council v Aylott [2010] ICR 1278, CA and Johnson v Coopers Lane Primary School Governors EAT 0248/09, to submit that a claim of direct discrimination cannot be based on an unproven assertion of stereotypical assumption.

60. In respect of comparators, the Tribunal referred to the case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, HL. This requires that valid comparators be people where there are not material differences in circumstances. This is relevant when considering a hypothetical comparator when there is no actual comparator.

61. Mr Powell, counsel for the Claimant, submitted that race discrimination allegations should be considered in the context that evidence of direct race discrimination is rare. He submitted that atypical and wholly unreasonable treatment to the Claimant, as has occurred in this case, is sufficient for the burden to pass to the Respondent and that they have failed to provide an adequate non-discriminatory reason. Therefore, he submitted, findings of race discrimination.

62. Mr Powell referred to the case of Base Childrenswear Limited v Otshudi [2019] EWCA Civ. 1648 to demonstrate the process of drawing inferences for unlawful discrimination.

## Conclusions

63. In view of the above findings of fact and the law set out above, the Tribunal's conclusions on the issues are as follows.

### Comparator

64. The Claimant refers to comparator 1, who is white British. Comparator 1 was not subject to the SJAR due to his long-term absence, which was much shorter period than the Claimant. Comparator 1 had been absent for less than 30 days was given and was given an Absence Appraisal. The Tribunal queried why the Claimant was given an SJAR instead of an Absence Appraisal and was informed that as informed that Comparator 1, who was not managed by Flight Lt Taylor, was given an Absence Appraisal as he was in the process of being medically discharged from the army.

65. The Tribunal also questioned whether the reasons for not providing an MPAR to the Claimant could have applied equally to not providing the Claimant with an SJAR. In these circumstances an Absence Appraisal would have been appropriate. However, the Tribunal accepts that given that the Claimant was not in the process of medical discharge he still needed to be graded by the sergeants grading board and as such an SJAR for him was required. The evidence of Flight Lt Taylor is that he believed that the Claimant's absence was becoming unworkable and we find that he believed that the Claimant's time in the army was coming to an end and the Claimant would eventually be medically discharged. The SJAR was written indicating that unless there was a significant change, the Claimant's time in the Training Wing and in MPS would be limited.

66. We do not conclude that Comparator 1 was in the same or similar circumstances as the Claimant given the line reporting, and absence of negative reports from various line managers, and the fact that Comparator 1 was in the process of medical discharge from the army.

### WhatsApp

67. Sgt Birch and Mr Elliot made upsetting comments regarding the Claimant singling him out in the conversation. The Tribunal conclude that the Claimant was reasonable feel he had been insulted by the comments directed at him, implying that his long-term absence from work was not genuine.

68. However, we accept Sgt Birch's evidence that he mentioned the Claimant in jest due to the fact that he was absent and this was not related to the Claimant's race. We did not hear from Mr Elliott. However, we have found that there were informal discussions about the Claimant's absence from work and the effect that this was having on operations. We conclude that the mention of the Claimant "*getting everywhere except work*" was a reflection of the fact that the Claimant was not at work and was absent for frequently and lengthy periods. The statement was an inappropriate and loose comment relating to the Claimant's absence and the impact on others who had to undertake his tasks. We have not accepted the evidence of Sgt Rashid of overhearing reference to Afro Caribbean and the Tribunal does not identify any inferential that race played a part in this discussion. The Tribunal had no basis to conclude that Sgt Birch and Mr Elliot would not have made equally inappropriate and loose comments about a white Sergeant who was absent from work for frequent and long periods.

69. The Claimant's claim in this regard therefore fails and is dismissed.

#### Right Turn Course

70. We conclude that Flight Lt Taylor and Mr Elliot criticised the Claimant's performance on a course that he did not carry out, the Right Turn Course. This course was carried out by the only other black serjeant in the Training Wing, Sgt Rashid.

71. We conclude that Flight Lt Taylor completely relied on Mr Elliott's assessment of the Claimant and this extended to the erroneous statement that the Claimant did the Right Turn course. There were no notes, no contemporaneous documents indicating that the Claimant was being assessed by Flight Lt Taylor. The Claimant had no knowledge that any such assessment had taken place.

72. We conclude that there was no proper basis for Mr Elliott to conclude that the Claimant had undertaken the Right Turn course or to convey this to Flight Lt Taylor. A cursory enquiry into the respective duties of each serjeant before the SJAR was completed would have easily identified this. We queried why it was documented in the SJAR that the Claimant, as the only other black serjeant, did the Right Turn course. It is evident that the Claimant was mistakenly stated as doing the Right Turn course, which Sgt Rashid was responsible for. We conclude that the mistake about the Claimant doing the Right Turn course, the colour of Sgt Rashid who did the course and our finding that Flight Lt Taylor did not observe the Claimant's teaching is sufficient for the burden of proof to shift to the Respondent to prove that the Claimant's race or colour played no part whatsoever in this erroneous conclusion.

73. We have rejected Flight Lt Taylor's evidence that he personally observed the Claimant and mistook the class he allegedly observed as the Right Turn course. We conclude that it is implausible that the reason for the mistake was that the class room was on the left hand side where the Right Turn course was being undertaken. This was not mentioned by Flight Lt Taylor as part of the service complaint or in his witness statement. Whilst mistakes can be made, the Respondent has not established that race played no part whatsoever in this mistake, which we find must

have been made by Mr Elliott, and relayed to Flight Lt Taylor, who did not verify this, and this was subsequently relayed Lt Col Nowell and the sergeants grading board.

74. The Claimant's claim for race discrimination in this regard therefore succeeds.

#### SJAR content

75. The Claimant has invited the Tribunal to take judicial notice of a fact that black individuals from Caribbean Islands are wrongly perceived by some to be in some way laid back and lazy and otherwise like to avoid work. Whilst the Tribunal can accept such a sweeping statement as a sad reality, such an observation has no impact of the assessment of our facts of this case. The Tribunal is required to determine matters on the evidence presented against the alleged proponents of discrimination given the circumstances of the case.

76. Mr Powell invited the Tribunal to infer from Lt Col Nowell's defensive email of 16 January 2019 referring to take a strong and defensible line to "*people like him*" in order to drive up the standard of our staff as referring to black Caribbean people. We do not accept this and conclude that the context was that Lt Col Nowell was referring to poor performing, insubordinate personnel. We therefore do not draw an inference of race discrimination from this exchange.

77. In this case, the Claimant has readily accepted that he is a relaxed, laid back person and that this is reflected in his SJAR's of previous years that he makes no complaints about. Therefore, the allegation that the Claimant was relaxed and laid back, which could be construed as indifferent by some, was factually accurate. We therefore do not conclude that the Claimant has established that there was any stereotypical assessment of him as a black Caribbean.

78. We have found that the critical comments made in the SJAR were based on actual, if subjective, feedback that was conveyed to Flight Lt Taylor from those that had encountered and observed the Claimant for the relevant period in MPS. These formed the basis of the critical comments in SJAR. We do not conclude that the feedback was based on any stereotypical assessment of the Claimant as a black Caribbean. We further conclude that Lt Col Nowell was able to authorise the SJAR due to the separate reports he had received about the Claimant from other officers and DNUS's who were leaving the correction centre, some of whom were instructors.

79. In view of the mistake recorded regarding the Right Turn course the Tribunal compared the SJAR of Sgt Rashid for the relevant year. It is evident that the detail and narrative was substantively different and indicates that there were in fact independent assessments of the two black serjeants to discount the possibility that they were not being assessed separately and individually.

80. We also considered whether the softening of the language in the final SJAR for 2017/ 2018 removing reference to "*indifferent attitude*" and "*being happy to do the minimum expected of him*" could form the basis of an inference for race discrimination. We concluded it could not. We have not concluded that the Claimant has established any stereotypical assumptions of Afro Caribbean's by others involved

in this case and conclude that there were actual, if subjective, assessments relayed to Flight Lt Taylor of the Claimant's performance through the relevant year.

81. In these circumstances the Claimant has not established that the critical comments recorded in the SJAR against him were because of his race or colour.

82. The Claimant's claim in this regard therefore fails and is dismissed.

83. A closed telephone preliminary hearing with Employment Judge Burgher will be held on 12 December 2019 to discuss case management for the remedy hearing.

Employment Judge Burgher  
Dated: 15 November 2019